Filed 4/25/19 In re N.B. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re N.B., et al., Persons Coming Under the Juvenile Court Law.	
SOLANO COUNTY DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Plaintiff and Respondent, v. D.W., Defendant and Appellant.	A154043 (Solano County Super. Ct. Nos. J43979, J43980, J43981)

D.W. (Mother) appeals from the juvenile court's order assuming dependency jurisdiction over her three children, N.B, age 11, N., age 7, and J., age 23 months (collectively, the Children), and removing them from her custody. The father of N. and J. is Lonnie, and the father of N.B. is Noah. Neither Lonnie nor Noah is a party to this appeal.

BACKGROUND

The case came to the attention of the Solano County Department of Health and Social Services (Department) in November 2017 on referral from a hospital where Mother had taken the Children to the emergency room to have them examined because, by her report, they were afflicted with some sort of parasites or worms. The visit was the seventh time Mother had brought her children to the hospital emergency room reporting

that the Children were suffering from parasites or worms. Upon examination on each occasion, no such thing was found.

Hospital staff felt that Mother was delusional and that her delusions were putting the Children at risk. Mother believed "that worms are in the child's skin and are everywhere, on everything, and on her"; she described using boric acid and hydrogen peroxide to bathe the Children in order to rid them of the worms and parasites she imagined; she said she had "worms coming out of her face and fingers" and that she was "throwing out food because when I touch food, worms come out of my fingers and grow in the food." Hospital staff believed these paranoid, delusionary behaviors were escalating, that boric acid in large enough concentrations could burn the Children, and that the Children we not being fed properly.

Over Mother's objections, and over the protests of N.B. and N., the Children were taken into protective custody at the hospital and placed in emergency foster placements. Upon hospital staff's determination that Mother was a danger to herself or others or was gravely disabled, she was involuntarily committed under Welfare and Institutions Code[1] section 5150 for 72 hours. Then, at the end of her section 5150 detention, she was again determined to be a danger to herself or others or gravely disabled, transferred to another facility, and committed for another 14 days' detention under section 5250.

A section 300 petition by the Department followed shortly after the children were taken into protective custody at the hospital. Included in the petition were, among other counts, count b-1 alleging a failure or inability to protect under subdivision section 300, subdivision (b) "based on a history of untreated mental illness which impairs her ability to provide adequate care, supervision and protection for her children," and counts g-2 and g-3 alleging, specifically with respect to the Children's fathers, their unknown whereabouts and failure to provide for care and support under section 300, subdivision (g).

[1] Subsequent undesignated statutory references are to the Welfare and Institutions Code.

The Department's Detention Report described Mother's long history with the dependency system, starting 16 years ago, when three of her other children were detained upon a report that they were living in dangerous conditions in a home without electricity, food or water. Mother eventually failed to reunify with these three children, and her parental rights were terminated. Exposure to domestic violence perpetrated against Mother by the men in her life is a common thread in all of her dependency cases. In 2003, with the other children, the domestic violence was at the hands of her then boyfriend; with N.B., N. and J., it was at the hands of Lonnie and Noah.[2]

Prior to the combined jurisdiction/disposition hearing, the Department amended its petition, adding a count j-1, which alleged under section 300, subdivision j, that Mother "has a prior Child Welfare Services case involving her oldest three children . . . [, who] were detained [in 2003] for reasons related to unsafe living conditions, substance abuse, and domestic violence" and further that Mother's "Family reunification services were terminated . . . [and] her children were subsequently adopted." The amended petition also added counts b-2 and b-3, with respect to the Children's fathers, Lonnie and Noah, respectively, alleging that both had engaged in domestic violence with Mother—Noah in an incident in which he stabbed Mother, an attack for which he was convicted and incarcerated for aggravated assault, and Lonnie for repeated incidents that "resulted in her relocation out of County and participation in domestic violence programs and shelters . . . ."[3]

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[2] Mother was provided with Family Maintenance services twice, once in 2008 after a domestic violence incident occurred between between her and Noah, and once in 2012 based on domestic violence with Lonnie and untreated mental health issues of Mother. In both of these situations, Mother was eventually able to demonstrate her ability to protect each of the Children involved (N.B. in 2008, and N.B. and N. in 2012).

[3] The domestic violence between Mother and Lonnie appears to have been related, in part, to friction between them over custody of N. Mother agreed to a family court order giving custody to Lonnie, but then at some point she absconded with N.

The Department's Jurisdiction/Disposition Report, as supplemented by an Addendum, described Mother's mental health problems in detail. According to a marriage and family therapist who interviewed Mother, the domestic violence in Mother's life is what triggered her mental illness. Although Mother disputes whether she suffers from a "history" of *untreated* mental illness as alleged in the petition, she does not dispute the basis of the section 300, subdivision (b) allegation with respect the two fathers based on the domestic violence they perpetrated on her.

Mother was granted visitation rights during the detention period and consistently visited the Children, without incident. She also engaged actively with her mental health therapist. Indeed, Mother made enough progress that, prior to the combined jurisdiction/disposition hearing, the Department, with the support of the social worker assigned to D.W.'s case, and D.W.'s mental health therapist, recommended that the Children be returned to her custody, supported by a set of "wraparound services" and a family maintenance plan.

In advance of the combined jurisdiction/disposition hearing, the Department amended its section 300 petition to conform to the Addendum, revising the allegations supporting counts b-1, b-2 b-3, g-2, and j-1, and seeking dismissal of all of other counts. At the hearing, the dependency court sustained counts b-1, b-2 b-3, g-2, and j-1, as amended and adjudged the Children to be dependents of the court. It declined, however, to follow the recommended disposition and return the Children to Mother's custody. Instead, the court continued the Children's out-of-home placements, and ordered reunification services for Mother, Lonnie and Noah.

At the conclusion of the proceedings as to disposition, the juvenile court explained that it thought it would be detrimental to return the Children to any of the parents without "more services." The court noted that it wanted to "slow" the matter down because it "d[id]n't know the full perimeters [sic] of [Mother's] psychiatric needs at this time" and "d[id]n't have a full workup," so it "th[ought] it would be irresponsible not to order a report" and that it would "need more time and that [wa]s the best way to protect all of [the] children."

Mother appeals from the findings and orders with respect to jurisdiction and with respect to disposition.

DISCUSSION

Jurisdictional Findings and Order

The Department argues Mother's appeal of the jurisdictional findings and order is moot because, given the undisputed basis for sustaining counts b-2 and b-3 with respect to Lonnie and Noah, the outcome will be the same regardless of what we say about the remaining counts. Mother responds that her appeal is not moot because the jurisdictional findings underlying counts b-1 and j-1 could prejudice her in future dependency proceedings. We agree with Mother on this threshold point and will address the merits of the appeal. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015.)

On the merits, Mother mounts various insufficiency of the evidence arguments with respect to counts b-1, g-2 and j-1. "The three elements for jurisdiction under section 300, subdivision (b) are: ' "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the [child], or a 'substantial risk' of such harm or illness." ' [Citations.] 'The third element, however, effectively requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).' " (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.) Evidence of past conduct may be probative of current conditions. (*In re James R.* (2009) 176 Cal.App.4th 129, 135–136.)

When reviewing a jurisdictional order, "[t]he standard of review in juvenile dependency cases is the same as in other appeals on grounds of insufficiency of the evidence. We review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions. 'All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.' " (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) Each individual allegation in a petition need not independently support jurisdiction, which may be based on a parent's "pattern of behavior." (*Id.* at p. 1650.)

There was ample evidence before the juvenile court showing (1) a pattern of domestic violence involving Mother and the fathers of the Children; (2) that this pattern of domestic violence had at least contributed to, if not caused, Mother's severe mental illness; (3) that Mother's mental illness had manifested itself in the form of delusionary behavior that presented a substantial risk of physical harm to the Children; (4) that the Children were at risk of harm by their exposure to domestic violence; and (5) that Mother's parental rights to her older children had been terminated in prior dependency proceedings for reasons that, in part, arose from the same pattern of domestic violence in Mother's relationships with men.

Mother, citing to *In re D.L.* (2018) 22 Cal.App.5th 1142, 1146, correctly emphasizes that the risk of harm element of the jurisdictional test "requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the future, that is, evidence showing a substantial risk that past physical harm will reoccur." That element was not satisfied here, she contends, because the court relied on her past mental health history, without crediting the extensive evidence of her *current* treatment, and the uniformly positive reports about her *current* condition from her social worker, her marriage and family therapist, and her psychiatrist. Nor, she contends, did the court take proper account of evidence that there was, in fact, rodent infestation in her home, something that was beyond her control. Mother's view is that the record stood unrebutted that her "current ability to provide adequate care, supervision and protection for her children was not impaired by any 'untreated mental illness.' "

That, however, is not how the juvenile court read the record. What Mother overlooks is that her mental health struggles appear to be interrelated with her unfortunate entanglements with abusive men. It is quite clear the two problems are not separate and discrete. One entirely rational reading of the record is that, even granting that Mother is now stable and doing well, another one of her episodic bouts with domestic violence could send her plunging into another mental health crisis at any time. We hope the progress she has made continues, and that she demonstrates sustained

stability throughout the reunification phase of the case—ultimately achieving the objective for which that process is designed, restoration of her family unit—but for now, it is not our role to second-guess the juvenile court's view of the level of risk to the Children, were they to be returned to her custody now.[4]

Dispositional Findings and Order

We review a dispositional order for substantial evidence, bearing in mind the heightened burden of proof. (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 (*Ashly F.*).) Conflicts in the evidence and reasonable inferences are resolved in favor of the prevailing party. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.) "[I]ssues of fact and credibility are questions for the trier of fact." (*Ibid.*) The juvenile court "must consider alternatives to removal, [but] it has broad discretion in making a dispositional order." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 918 (*Cole C.*).) "A removal order is proper if it is based on proof of (1) parental inability to provide proper care for the minor and (2) potential detriment to the minor if he or she remains with the parent." (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1163.) A "parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. [Citations.] In this regard, the court may consider the parent's past conduct as well as present circumstances. [Citation.]" (*Cole C.*, at p. 917.)

Mother argues that the juvenile court was "unaware of a number of critical aspects of the required findings and orders under section 361, subdivision (c)(1),

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[4] Among the various arguments made by Mother with respect to the jurisdictional findings is a contention that the omission of any finding sustaining count g-2 as to Noah in the written order memorializing its findings (which is on Judicial Council Form JV-412) conflicts with the reporter's transcript of the combined jurisdiction/disposition hearing and the minute order entered after the hearing, both of which show it was the court's intention to sustain count g-2 as to Noah. Mother argues that the court's orally announced ruling should control. We agree. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073 ["When there is a discrepancy between the minute order and the oral pronouncement of judgment, the oral pronouncement controls."].)

that i[s], that its findings must be by clear and convincing evidence that '[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor' *and* that 'there are no reasonable means by which the minor[s'] physical health can be protected . . . .' " (Italics omitted). We disagree that the record shows the court was under some misapprehension of the law. The findings indicate that the court found the "circumstances stated in . . . § 361" were established by clear and convincing evidence.

Mother insists that the court's articulated reasons for rejecting the Department's recommendation that the Children be returned to Mother indicates it may have failed to understand that the " 'bias of the controlling statute is on family preservation, not removal' " (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146 (*Hailey T.*), that section 361 effectively creates a "statutory presumption the child will be returned to parental custody" (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1086), and that the court must be convinced removal is the only way to protect the child (*In re A.S.* (2011) 202 Cal.App.4th 237, 247), with removal being a " 'last resort' " (*Hailey T., supra*, 212 Cal.App.4th at p. 146). We have no reason to believe the court failed to appreciate these principles simply because, on the record presented, it disagreed with the Department that returning the Children to Mother was a viable option at disposition.

Finally, Mother argues the juvenile court's determination of the risk of harm to the children was not supported by substantial evidence. She cites *Ashly F., supra*, 225 Cal.App.4th at page 809 to support her contention that the juvenile court "should have considered, among other things, unannounced visits by [the Department] and in-home counseling services as reasonable means by which the court could obviate the need for removal." *Ashly F.* is distinguishable. There, the Department provided no supporting evidence in its report that reasonable services to prevent removal from the mother's home had been offered, and that the mother expressed remorse for the injuries she inflicted on the children's half-sister and was

enrolled in a parenting class to learn other ways to discipline her children. (*Id.* at pp. 808–810.) Here, the record shows the juvenile court did consider in-home counseling services as an alternative to removal. There was also evidence that despite her demonstrated willingness to engage with mental health therapy, Mother showed little insight and understanding of the risks her mental health issues posed to the Children.[5]

DISPOSITION

The jurisdictional and dispositional orders are affirmed in all respects except for the minor errors of form noted, respectively, in footnote 4 (the erroneous omission of the finding supporting count g-2 in the written order) and footnote 5 (the erroneous reference to the original petition in the written order). The jurisdictional and dispositional orders are conditionally vacated and remanded for correction of these two errors. Once the necessary corrections are made, the orders shall be reinstated.

[5] Mother also argues that, as with the jurisdictional findings and order, there is a conflict between the written disposition order (this time on Form JV-415), and the court's oral findings and minute order entered after the combined jurisdiction/disposition hearing. The written order indicates that on the record before the juvenile court at that hearing the court was acting upon the "original petition," when in fact the petition as amended in the Addendum to the Jurisdiction/Disposition Report is what the reporter's transcript shows the court acted upon. Here again, we agree with Mother that the reporter's transcript controls.

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STREETER, J.

WE CONCUR:

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POLLAK, P.J.

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BROWN, J.